

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWENTY-FIVE

Michigan City, IN

ULTRA STORES, INC.
Employer

and

25-UC-237

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL UNION NO. 881
Petitioner

DECISION AND ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held July 9, 2008, before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine the appropriate placement of the disputed job classification discussed herein.¹

I. ISSUE

Petitioner seeks to clarify that the bargaining unit certified in Case 25-RC-10423 should include the classification of Assistant Store Manager, which is currently occupied by Amanda Tilden. Petitioner asserts that Tilden is not a Section 2(11) supervisor within the meaning of the Act, and therefore is appropriately part of the certified bargaining unit. Employer counters that Tilden is a Section 2(11) supervisor and therefore is necessarily excluded from the bargaining unit.

II. DECISION

For the reasons discussed in more detail below, it is concluded that the Assistant Store Manager classification, and more specifically Amanda Tilden as its current occupant, does not possess any of the Section 2(11) supervisory indicia and does not constitute a supervisor within the meaning of the Act. Therefore, the bargaining unit shall be clarified to include the Assistant Store Manager classification.

¹ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

A. Statement of Facts

1. The Certified Bargaining Unit

Upon a petition duly filed under Section 9(c) of the Act in Case 25-RC-10423, a stipulated election was held on April 23, 2008. Subsequent to that election, on May 1, the undersigned issued a Certification of Representative finding that at that election a majority of the valid ballots had been cast for Petitioner. The certified bargaining unit as identified in Case 25-RC-10423 is:

All regular full-time and part-time employees of the Employer at its Michigan City, Indiana, facility; BUT EXCLUDING all office clerical employees, professional employees, and all guards and supervisors as defined in the Act.²

The parties have indicated that they are in the very early stages of bargaining a first collective bargaining agreement.

2. Operations at Employer's Michigan City Store

Employer operates 195 retail stores specializing in the sale of fine jewelry, including diamonds, gemstones, watches, and gold. The store at issue here, located in Michigan City, Indiana, is a full-line store located in an outlet mall. Katie McKay is the District Manager over 16 different stores, including the one in Michigan City. The Michigan City Store Manager is Toni Lee, and the Assistant Store Manager is Amanda Tilden. There are currently three Associates who work in the store, one of whom is a "keyholder."³ A fourth Associate resigned in June 2008 and has not yet been replaced.

While all of the store personnel are involved in customer sales, the Associates and Assistant Store Manager are expected to sell eight times their hourly pay rate, while the Store Manager only has to sell four or five times her pay rate. The three Associates at the Michigan City store make a base rate of \$9.23, \$9.90, and \$10.80 per hour plus commission; Tilden makes \$11.03 per hour plus commission; the Store Manager is a salaried position, but the record does not reflect her current pay rate. In addition to their commissions, the employees are entitled to various levels of incentives based upon their store reaching its sales goal. If the Michigan City store reached its sales goal in the fourth quarter of 2007, for example, an Associate would receive an additional amount of commission; an Assistant Store Manager would receive the same additional amount of commission plus a bonus of up to \$700 and three vacation days; and the Store Manager would receive a bonus of up to a trip for two (to Cancun, in 2007), \$1500, and

² There is no evidence in the record to indicate that the parties have, through bargaining or otherwise, modified the bargaining unit beyond what was certified.

³ The terms "Associates" and "employees" are used interchangeably herein, since that is the terminology utilized by Employer. While apparently not a distinct classification, certain Associates are referred to as "keyholders" because they are given a set of keys to the store and a distinct code for the alarm system.

five vacation days. All employees are entitled to an employee discount on purchases, but the discount for an Assistant Store Manager is approximately 5% higher than for an Associate, while the Store Manager is entitled to an additional 5-10% beyond the discount offered to the Assistant Store Manager.

The Michigan City store is open from 9:00 a.m. to 9:00 p.m. Monday through Saturday, and 10:00 a.m. to 7:00 p.m. on Sunday. Store Manager Lee usually works 48 hours per week, while Assistant Store Manager Tilden and the Associates are typically allocated 32 hours per week. Pursuant to corporate policy, the store cannot open unless at least two employees are present, and generally there are two or three employees working in the store at any one time. The Store Manager is responsible for preparing the weekly schedules for employees, although Tilden has done the schedule twice and submitted it to the Store Manager to review and make changes. The schedules are approved by District Manager McKay before they are issued to the employees. While Lee tries to schedule the two managers (Lee and Tilden) to work at opposite times so that there is as much managerial coverage as possible, it is not uncommon to have periods of time where neither the Store Manager nor Tilden will be working in the Michigan City store. Most often when an employee needs to be absent they will find their own replacement, although it is ultimately the Store Manager's responsibility (or in her absence, Tilden's) to find somebody else from the remaining employees to provide coverage. Employees clock in and out on the registers at the Michigan City store, and Lee is the "time clock editor" responsible for making sure that employees' time is recorded correctly. However, when Store Manager Lee will be out of the store, the District Manager can authorize Tilden (or even an Associate) to serve as the time clock editor.

Employees are able to sell merchandise to customers throughout the various sections of the store, such as diamond fashion jewelry, gemstones, or bridal. Lee typically assigns employees responsibility for one specific section of the store, and that employee is responsible for counting and cleaning that area when they are at work. The Michigan City store maintains a binder of daily or weekly "to-do lists" that identify tasks which must be completed. While generally no specific employee is assigned to complete any particular task, employees are expected to review the binder and initial off on the tasks that they complete. While these "to-do lists" are typically created by the Store Manager, Tilden has, on occasion, created a "to-do list," as have other employees, either on their own initiative or at the direction of the District Manager. When the Michigan City store is participating in a special promotion or sales event, Tilden may be involved in directing the employees to hang certain signs or banners supporting that promotion in the store. However, it is the corporate office or District Manager who specifies when and where the signs are to be placed. In making sales, employees are generally permitted to provide additional discounts to customers of up to 10%; authorization from the Assistant Store Manager or Store Manager is required for an Associate to exceed that 10% discount. Various sales and inventory reports must be completed by the store each week or month and submitted to the corporate office, and while those reports are generally completed by a Store Manager or Assistant Store Manager, they have also been completed by one of the associates who is a keyholder.

3. The Assistant Store Manager Classification

The Assistant Store Manager position is part of the established hierarchy at Employer's full-line stores, although some of those locations have operated with a vacancy in that position for a year or more. At the Michigan City location, Amanda Tilden has served as the Assistant Store Manager for the past year. Prior to being promoted to that position, Tilden was an Associate and a keyholder. The Assistant Store Manager reports to the Store Manager. The Assistant Store Manager and Store Manager positions share a common job description, and therefore on paper appear to be very similar positions. Becoming an Assistant Store Manager is often a stepping-stone for advancing further in the company, and in many situations is treated as a training tool to help the employees in the Assistant Store Manager classification to advance to a Store Manager position. The criteria that District Manager McKay used in deciding to promote Tilden to Assistant Store Manager was her personal sales capacity, graduating from Employer's diamontology course, and understanding Employer's operational reports.

The Assistant Store Manager is responsible for managing and tracking the sales of the store and the store's employees; training staff about selling skills, security measures, and how to properly ring-up sales; and managing the inventory of the store, including generating inventory reports in the Store Manager's absence. The Assistant Store Manager will also provide coverage if the Store Manager is away from the store at a conference or on vacation. However, at the Michigan City location Store Manager Toni Lee exercises a broader range of duties on a regular basis than Tilden does. Thus, while Tilden may be "in charge" of the store while Lee is on vacation, Tilden will regularly consult with District Manager McKay or will work off of "to-do lists" prepared by the Store Manager in anticipation of her absence. District Manager McKay has monthly conference calls with all of the Store Managers in her district, and Assistant Store Managers will sometimes participate. Tilden, however, has never participated in such a conference call.

All hiring, as well as all serious discipline, such as suspensions or discharges, must be submitted to District Manager McKay for her review and approval. The Assistant Store Manager may participate in job interviews and make a recommendation about hiring to the Store Manager, and ultimately the District Manager. However, Tilden has either never had occasion to do that or has done that on perhaps only one occasion.⁴ Tilden does not have the authority to issue an employee a disciplinary write-up, but she has observed potential employee misconduct and reported it to the Store Manager, or in Lee's absence, to the District Manager. There is no evidence to indicate whether such a report by Tilden includes a recommendation of what action should be taken against the employee. On one occasion where an employee wanted to miss work, Tilden instructed the Associate that she was on the schedule and expected to come into work. Tilden then consulted with McKay, who agreed that the employee had to come into work and called the employee herself to reiterate that she was expected to come into work. On another occasion where an employee refused to complete a task that Lee had assigned via a "to-do list" entry, Tilden told the employee to raise the issue with Lee when she returned to work. Lee completes all the employee performance reviews, and although Tilden is not involved in the reviews, she may provide input to Lee about specific employees.

⁴ See discussion in footnote 6, *infra*.

B. Discussion

1. The Law

The Board typically will not process a representation petition filed during the year following the certification of an appropriate bargaining unit. However, where the status of an employee classification has been left unresolved by the initial election and certification process, and the parties cannot thereafter resolve the status of those employees, the Board can properly process a unit clarification petition to determine the placement of those employees. See Kirkhill Rubber Co., 306 NLRB 559, 559 (1992). Since the inclusion or exclusion of the Assistant Store Manager position at the Michigan City store was not resolved by the initial certification, and the parties have been otherwise unable to resolve the status of that position, it is proper for the Region to process to current unit clarification petition.

To determine whether an individual is a supervisor within the meaning of Section 2(11) of the Act, the Board examines: (1) whether the individual has the authority to engage in any one of the twelve enumerated powers listed in Section 2(11) of the Act; and (2) whether the exercise of such authority requires the use of independent judgment. See, e.g., NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 573-574 (1994); NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 707 (2001). Section 2(11) of the Act defines the term “supervisor” as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Board revisited the issue of supervisory status in Oakwood Healthcare, Inc., 348 NLRB No. 37 (Sep. 29, 2006), in light of the Supreme Court’s findings in Kentucky River. See also Croft Metals, Inc., 348 NLRB No. 38 (Sep. 29, 2006); Goldcrest Healthcare Center, 348 NLRB No. 39 (Sep. 29, 2006). In Oakwood, the Board adopted “definitions for the terms ‘assign,’ ‘responsibly to direct,’ and ‘independent judgment’ as those terms are used in Section 2(11) of the Act.” Oakwood, supra, slip op. at 3.

In Kentucky River, the Supreme Court rejected the Board’s interpretation of “independent judgment” to exclude the exercise of “ordinary professional or technical judgment in directing less skilled employees to deliver services.” Kentucky River, supra at 713. Therefore, in Oakwood, the Board adopted an interpretation of the term “independent judgment” that “applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise. In short professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11).” Oakwood, supra, slip op. at 7. The Board noted that “Section 2(11) contrasts ‘independent judgment’ with actions that are ‘of a merely routine or clerical nature.’” Id. slip op. at 8. The Board stated that “a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a

collective-bargaining agreement.” Id. However, the Board clarified that “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” Id.

In representation proceedings the burden of establishing an individual’s supervisory status rests upon the party making such assertion. See, e.g., Oakwood, supra, slip op. at 9; see also Kentucky River, supra at 711-12. A lack of evidence is construed against the party asserting supervisory status. The Board is reluctant to confer supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act. See, e.g., Vencor Hospital-Los Angeles, 328 NLRB 1136, 1138 (1999). The Board has found that a particular indicia of supervisory status has not been established if the evidence is in conflict or otherwise inconclusive regarding that indicia. See Phelps Community Med. Ctr., 295 NLRB 486, 490 (1989). Mere inferences or conclusory statements made by witnesses in their testimony, without detailed, specific supporting evidence, are insufficient to establish supervisory authority. See Sears Roebuck & Co., 304 NLRB 193 (1991).

2. Assistant Store Manager Classification

Petitioner seeks to clarify the bargaining unit to include Amanda Tilden as the Assistant Store Manager at the Michigan City store, and they argue that she is not a Section 2(11) supervisor within the meaning of the Act. In contrast, Employer asserts that Tilden is a supervisor and should therefore be excluded from the certified bargaining unit. More specifically, Employer asserts in its post-hearing brief that Tilden has the authority to assign work to Associates and responsibly direct them, as well as to effectively recommend the hire, discharge, or discipline of employees. Here, however, the record evidence is insufficient to establish that the Assistant Store Manager at the Michigan City location, and more particularly Tilden, is a statutory supervisor.

(a) Assignment Of Work And Responsibly Directing

Employer points out that the Store Manager and Assistant Store Manager positions share a common job description and argues that there is little real difference between the two classifications.⁵ Employer further asserts that District Manager Katie McKay regularly works with both Store Manager Toni Lee and Tilden concerning the operations of the Michigan City store, and that McKay considers Tilden to be Lee’s “right arm.” However, the evidence adduced at hearing does not support this assertion to the extent that would justify a finding of 2(11) supervisory authority. For example, the work schedules for the Associates at the Michigan City store are prepared by Lee. Tilden testified that in the one year she has been an Assistant Store Manager, she could recall only two occasions where she was involved in drafting a schedule for the store herself. However, on both of those occasions the draft was submitted to Lee, who did not simply adopt the proposed schedule, but instead made revisions to Tilden’s proposal. It is also Lee who assigns the Associates responsibility for a specific section of the store, such as bridal or gemstones.

⁵ Although they share a common job description, Tilden testified that she was never provided a copy of the job description and there is no evidence to indicate otherwise.

The Michigan City store utilizes a binder with “to-do lists” to assign employees specific tasks that must be completed on a daily or weekly basis. There were only two examples presented at hearing of occasions where Tilden has prepared a “to-do list” for the Associates at the store in her year as an Assistant Store Manager. While the “to-do lists” identify the tasks that need to be completed at the store, the lists in evidence do not indicate that any particular employee was assigned any particular task. Rather, Associates are apparently expected to review the “to-do lists” and take it upon themselves to complete the tasks as appropriate. Further, Tilden indicated that the “to-do lists” typically consist of common items that are done everyday and that the Associates are already familiar with which tasks need to be completed in their specific section of the store.

Tilden may also “assign” employees to place certain signs up in the store during special promotions, as required by Employer’s corporate office. Since typically there may be only one or two other employees besides Tilden working at any one time, there is little discretion exercised by Tilden in having an employee hang a sign. Asking the only other employee in the store to hang a sign cannot be seen as utilizing independent judgment. Tilden also indicated that any of the employees are capable of placing those signs, which further indicates that Tilden does not need to exercise any independent judgment in “assigning” an employee to hang a sign in the store. Tilden’s relay of corporate instructions is merely engaging in the ministerial action of complying with an Employer policy. As the Board held in Oakwood, assignments must involve a degree of discretion that rises above the routine or clerical in order for supervisory authority to be found. Oakwood, *supra*, slip op. at 10.

Tilden is the one who is in charge when Store Manager Lee is on vacation or away at a conference. The record is unclear how often that may occur, although the Store Manager is given two weeks of vacation each year. However, in anticipation of being absent, Lee prepares the schedule and “to-do lists” for the Michigan City store for the time period when she will be gone. This is really not much different than the regular state of affairs at the Michigan City store, where Lee prepares the schedules and has assigned employees to work in specific sections of the store. Recall that Lee and Tilden spread their schedules out so that, to the extent possible, the two are not working in the store together at the same time, and that there are times when neither Lee nor Tilden are present in the store. When potential issues arise about Associates, such as when an employee refused to organize some watches as indicated in the “to-do lists,” Tilden told the Associate she would need to speak to Lee when she returned to the store. At another point when an employee indicated she could not come into work, Tilden consulted with District Manager McKay and ultimately had McKay contact the Associate to reiterate that she must come into work. Such actions do not constitute Section 2(11) indicia within the meaning of the Act. Further, even if Tilden did exercise some of the supervisory indicia while filling in during Lee’s absence, the occasional exercise of Section 2(11) authority is insufficient to convert that position to a supervisor under the Act. See, e.g., Commercial Fleet Wash, Inc., 190 NLRB 326 (1971).

There is also insufficient evidence to demonstrate that Tilden is held responsible for the actions of the Associates at the Michigan City store. Employer points to only a single incident, when an Associate contacted Tilden for approval of a trade-in and informed her that approval had already been obtained, even though it had not. Tilden approved the trade-in. Tilden was

subsequently disciplined for assuming the employee had already gotten approval, rather than verifying and getting the approval herself. Employer never introduced the written discipline into the record, so it is impossible to tell exactly what the disciplinary report said. However, it is clear from the record that Tilden was disciplined for her own actions (i.e. failing to get approval for a trade-in), rather than being held responsible for the actions of the other employee. In order for the direction of work to be “responsible,” the person directing and performing the oversight must be held accountable for the performance of the task by the other such that some adverse consequence may befall the one overseeing the task if the tasks are not properly performed. Oakwood, supra, slip op. at 7.

Thus, the evidence as a whole is insufficient to demonstrate that the Assistant Store Manager at the Michigan City store assigns work to employees at the store by utilizing her independent judgment or responsibly directs employees as contemplated by Section 2(11) of the Act.

(b) Hiring, Firing, And Disciplining Associates

Employer argues that Tilden has the authority to effectively recommend the hiring, firing, or discipline of Associates at the Michigan City store. However, the evidence presented at hearing is insufficient for Employer to carry its burden. While there is some testimony that as an Assistant Store Manager Tilden may participate in the interviewing of job candidates, Tilden denied participating in any such interviews.⁶ Store Manager Lee indicated that she gives “high weight” to what Tilden may say, but there is insufficient evidence to demonstrate that Tilden is actually able to effectively recommend somebody for hire. Further, even assuming that Tilden has commented on an employment applicant, any recommendation by Tilden is reviewed by Lee, who then makes her own recommendation to District Manager McKay, who is the ultimate authority in all hiring decisions. Thus, any recommendation of the Assistant Store Manager based on an interview is too far removed from the final hiring decision to indicate that Tilden can effectively recommend an applicant for hire. Finally, while Lee testified that Tilden may also be involved in verifying a candidate’s references or prior work history, there is no evidence that any work done by Tilden along those lines is anything more than a ministerial process. Such ministerial functions do not constitute Section 2(11) indicia under the Act. See, e.g., Oakwood, supra, slip op. at 10.

⁶ Employer asserts in its brief that Tilden conducted a two-hour interview of job applicant Cheryl Roper. Tilden denied conducting any interview, but apparently agreed that she had a two-hour conversation with Roper. However, at several key points in the record, Tilden’s testimony about this situation was apparently “inaudible” or otherwise not properly recorded by the Court Reporter. District Manager McKay testified she was not sure whether or not Tilden participated in the interview of Roper, and Store Manager Lee’s testified only that Tilden sat in on one interview. Therefore, it is hard to establish exactly what Tilden’s involvement was in the hiring of Roper. Regardless of whether or not the “conversation” with Roper constituted an interview, as discussed in more detail below there is insufficient evidence to indicate that Tilden could effectively recommend Cheryl Roper or any other job applicant for employment.

Employer also asserts that the Assistant Store Manager at the Michigan City store can effectively recommend that discipline be issued to an Associate, or even that an Associate should be fired. However, there is little evidence to show that Tilden has actually been involved in that process at all. For example, at one point an employee refused to perform one of the tasks, organizing watches, that Store Manager Lee had assigned before leaving on vacation. When Tilden discovered that the employee had not completed the task, she asked why and then referred the Associate to discuss the issue with Lee when she returned to the store. Tilden prepared a written report of this incident at the request of Lee when she returned to the store. On another occasion when an Associate called off from work, Tilden instructed the employee that she was on the schedule and needed to report to work. Tilden then contacted District Manager McKay and requested that she contact the employee and reiterate that the employee must report to work. Further, while Tilden did indicate that she could complete disciplinary reports, the evidence indicates that such “reports” are not actual discipline, but simply a report to Lee or McKay reporting on conduct that had occurred. Similar to the watch incident just discussed, there is no evidence that such reports by Tilden actually include a recommendation on discipline, nor that any such recommendation was followed by upper management. Regardless of whether or not Tilden made any disciplinary recommendations, there is no evidence to indicate that either employee in these incidences was actually disciplined. As the Board has held, merely reporting employee misconduct without recommending any particular corrective action is not an indicia of supervisory status. See Rest Haven Nursing Home, 322 NLRB 210 (1996).

Based on the foregoing, the evidence is insufficient to establish that the Assistant Store Manager at the Michigan City facility can effectively recommend the hire, fire, or discipline of employees.

III. Conclusion

Taken as a whole, Employer has failed to carry its burden of demonstrating that Tilden exercises any of the supervisory indicia indicated in Section 2(11) of the Act.⁷ Therefore, having found that Tilden is not a supervisor, the Assistant Store Manager classification at the Michigan City store is appropriately included within the scope of the bargaining unit.⁸

⁷ Consideration of secondary indicia is not warranted in this case. Without a finding that the Assistant Store Manager possesses at least one indicia of supervisory status, secondary indicia of supervisory status is an insufficient bases upon which to find supervisor status. See, e.g., Central Plumbing Specialties, Inc., 337 NLRB 973, 975 (2002); Billows Electric Supply, 311 NLRB 878 (1993).

⁸ Although not specifically discussed at the hearing or in briefs, as the focus was solely on the supervisory status of Tilden, apparently no party is disputing that the Assistant Store Manager classification would share a community of interest with the rest of the bargaining unit. Thus, since the certified bargaining unit includes “all employees” at the Michigan City store, having found that Tilden is not a supervisor within the meaning of the Act necessarily means that the Assistant Store Manager classification is included in the unit.

IV. ORDER

Based upon the above findings of fact and conclusions of law, IT IS HEREBY ORDERED that the unit represented by the Petitioner shall be clarified to include the classification of Assistant Store Manager.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street. N.W., Washington, DC, 20570. This request must be received by the Board in Washington by August 25, 2008. The request may be filed electronically through E-Gov on the Board's web site, www.nlr.gov,⁹ but may not be filed by facsimile.

DATED AT Indianapolis, Indiana, this 11th day of August, 2008.

/s/

Rik Lineback
Regional Director
National Labor Relations Board,
Region Twenty-five
Room 238, Minton-Capehart Building
575 North Pennsylvania Street
Indianapolis, Indiana 46204-1577

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⁹ To file the request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu. When the E-File page opens, go to the heading Board/Office of the Executive Secretary and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlr.gov.